

**ST 99-12**

**Tax Type: Sales Tax**

**Issue: Responsible Corporate Officer – Failure to File or Pay Tax**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**"DOROTHY GALE", as responsible officer  
of "Munchkinland Enterprises, Inc.",**

**Taxpayer**

**No. 98-ST-0000  
NPL # 0000**

**Kenneth J. Galvin  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Alan F. Segal, on behalf of "Dorothy Gale", Mr. John Alshuler on behalf of the Department of Revenue of the State of Illinois.

**Synopsis:**

This matter comes on for hearing pursuant to "Dorothy Gale" (hereinafter "Gale") protest of Notice of Penalty Liability No. #0000 (hereinafter the "NPL"). The NPL was issued by the Department against "Gale", as responsible officer of "Munchkinland Enterprises, Inc." The NPL covers the period from February of 1993 through October of 1993. A hearing was held on this matter on April 29, 1999, with "Gale", Ms. "Anne T. Em", and Ms. "Elmira Gulch" providing oral testimony. Following submission of all evidence and a review of the record, it is recommended that

the matter be resolved in favor of the Department. In support thereof, the following “Findings of Fact” and “Conclusions of Law” are made.

**Findings of Fact:**

1. The Department’s prima facie case, inclusive of all jurisdictional elements, is established by the admission into evidence of NPL #0000, which shows a penalty for tax liability of "Munchkinland Enterprises, Inc." in the amount of \$117,392.79, including interest calculated through May 9, 1996. Dept. Gr. Ex. No. 1.
2. The NPL was issued against "Gale" on May 9, 1996, and covers the period from February of 1993 through October of 1993. Dept. Gr. Ex. No. 1.
3. "Munchkinland Enterprises, Inc." did business as "The Great & Powerful Oz Vehicle Center, Inc." ("GPOVC") "GPOVC" was a recreational vehicle, boat and hot air balloon dealership. Tr. p. 15.
4. "Elvira Gulch" (hereinafter “Gulch”) was president of the business and owned 51%. Her husband, "Professor J. Marvel" (hereinafter “Marvel”) owned 49%. Tr. p. 15.
5. "Gale" is "Gulch's" sister. At the time the business was purchased, "Gulch" and "Marvel" intended that "Gale" would fill a vice president’s or general manager’s position. On November 18, 1992, counsel for "Munchkinland Enterprises, Inc." sent "Gulch" a draft of a Board of Director’s resolution, dated May 22, 1992, electing "Gale" as Vice President. This resolution was never signed. Tr. p. 18-21; Taxpayer’s Ex. No. 1.
6. "Gale" held the office of corporate secretary. Tr. p. 21-22.
7. "Gale" or someone else in the office would usually prepare a list of payables and "Gale" would bring the list to "Gulch". "Gale" and "Gulch" would discuss the bills and "Gulch"

- decided which bills to pay. "Gulch's" priority in the payment of bills was that the people that worked for her got paid first. "Gale" notified "Gulch" that she was behind in the payment of sales taxes, but "Gulch" gave precedence to the payroll. Tr. p. 23-27.
8. When "Gulch" fell behind with sales taxes, she reached an agreement with the Department of Revenue where she would pay the Department approximately \$30,000 as partial payment for back taxes, continue to pay back taxes at the rate of \$8,600 or \$8,700 per month and pay current taxes upon the sale of the vehicles. Tr. p. 32-33.
  9. On August 19, 1993, the Department of Revenue terminated the installment contract with "GPOVC". Notice of the termination was sent to "Marvel" Tr. p. 38-40; Taxpayer's Ex. No. 2.
  10. On April 16, 1996, "Gulch" protested the Department's "Ten Day Notice of Intent to Issue Penalty Liability of Notice of Deficiency." In her letter to the Department, "Gulch" alleged that the State breached its agreement with "GPOVC" by levying the corporate bank accounts in August of 1993. The letter states that the levy made operation of the business impossible as cash was frozen and precipitated the need for the corporation to file bankruptcy. Tr. p. 52-54; Taxpayer's Ex. No. 3.
  11. The General Ledger for "GPOVC" shows a "Payment on Tax Note," of \$8,650 on June 13, 1993 (Page 73), a payment to "Dept. Rev." of \$8,650 on July 19, 1993 (Page 75), a payment of \$1,467 to "Dept. Rev." on July 19, 1993 (Page 75), and a payment of \$932.96 to "Dept. Rev. Rodiek" on July 19, 1993 (Page 75). The \$8,650 payments were made pursuant to the installment agreement reached previously with the Department. Tr. p. 55-58; Taxpayer's Ex. No. 4.

12. The Department's "Exceptions Processing System, Payment Directory" shows payments received from "Munchkinland Enterprises, Inc." on June 16, 1993, of \$8,650 and on July 20, 1993, of \$8,650. Tr. p. 63-64; Taxpayer's Ex. No. 5.
13. "Gale" worked for "GPOVC" from May 19, 1992, through the end of July, 1993. His responsibilities included supervising the daily operations of the company, ensuring that bank deposits were made and that bills and payroll were paid. Tr. p. 65-66.
14. The "Illinois Business Registration" form, NUC-1, Question 12, which states "I accept personal responsibility for the filing of returns and the payment of taxes due" was signed by "Dorothy Gale," as "VP & Gen Mgr." on May 22, 1992. Tr. p. 74; Dept. Gr. Ex. No. 2.
15. "Anne T. Em" began working for Great Southwest Vehicle Center in the office in May or June of 1992. After "Gale" and "Gulch" determined which bills to pay, "Em" would write the check and "then take it into "Dorothy" ("Gale") or "Elvira" ("Gulch") and then they'd sign it." Tr. p. 12-13.

**Conclusions of Law:**

The sole issue to be decided in this case is whether "Gale" should be held personally liable for the unpaid retailers' occupation tax of "GPOVC". The statutory basis upon which any personal liability is premised is Section 13½ of the Retailers' Occupation Tax Act, which provides in relevant part:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment \*\*\* and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon;

The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty under this Section.  
Ill. Rev. Stat., ch. 120, par. 452½ (1987).

It is clear under Section 13½ that personal liability will be imposed only upon a person who: (1) is “responsible” for filing corporate tax returns and/or making the tax payments; and (2) “willfully” fails to file and/or pay such taxes.<sup>1</sup>

The admission into evidence of the NPL establishes the Department’s *prima facie* case with regard to both the fact that "Gale" was a “responsible” officer and the fact that "Gale" “willfully” failed to file and or pay. Branson v. Department of Revenue, 168 Ill. 2d 247, 262 (1995). Once the Department has established a prima facie case, the burden shifts to the taxpayer to overcome the case. Masini v. Department of Revenue, 60 Ill.App.3d 11 (1<sup>st</sup> Dist. 1978).

Initially, there is a question as to what "Gale’s" role was in the corporation. According to the statute, it is not necessary that an individual have a specific title or status in the corporation for liability to be imposed. If, as an employee, an individual has the control, supervision, or responsibility of filing returns and making payment of the tax, and willfully fails to file such return or make such payment, he will be subject to personal liability. In determining whether an individual is a responsible person, the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she

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<sup>1</sup> Prior to January 1, 1994, Section 13½ of the Retailers’ Occupation Tax Act governed the assessment of personal tax penalties against responsible corporate officers or employees. However effective January 1, 1994, the penalty provision of Section 13½ was replaced by Section 3-7 of the Uniform Penalty and Interest Act (35 ILCS 735/3-7).

Here the taxes accrued in 1993, while Section 13½ was in effect. On the other hand, the NPL was not issued until 1996. Thus, a question arises as to whether Section 13½ or Section 3-7 controls the case at hand. In Sweis v. Sweet, 269 Ill.App.3d 1, 12 (1995), it was held that the

participates in decisions regarding the payment of creditors and the disbursement of funds. See, *e.g.*, Monday v. United States, 421 F.2d 1210 (7<sup>th</sup> Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

The Department introduced as evidence the “NUC-1,” “Illinois Business Registration” form, in which "Gale" accepted personal responsibility in Question 12 as “VP & Gen Mgr.” for filing and payment of taxes. Tr. p. 74; Dept. Gr. Ex. No. 2. "Gulch" testified that at the time that the business was purchased, it was intended that "Gale" would assume the vice president or general manager positions that were listed on the “NUC-1,” but that a resolution electing "Gale" as Vice President was never signed. Tr. p. 18-21; Taxpayer’s Ex. No. 1. "Gulch" stated that "Marvel" would not “sign any of the papers to allow that to occur.” Tr. p. 19.

"Gulch" owned 51% of the stock in the corporation and "Marvel" owned 49%. As majority shareholder in the corporation, "Gulch" had the authority to appoint "Gale" as “vice president” without the signature of "Marvel", and accordingly, I find her testimony on this issue to not be credible. Tr. p. 42. "Gulch" and "Gale" have apparently concluded that "Gale" is not a responsible officer under the Act and that her signature in response to Question 12 on the “NUC-1” is not binding because "Gale" was never officially elected or appointed “vice president.” These conclusions are incorrect. According to the statute, personal liability may be assessed against “any officer or employee” of a corporation. Although "Gale" never acquired the title of “vice president,” through either her own inaction or acquiescence or because "Gulch" chose not to sign a Board resolution, she did assume the position of “corporate secretary,” making her an officer of the

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penalty provision “in effect at the time the tax was incurred” should be applied. In accordance with this holding, I conclude that Section 13½ is controlling.

corporation. Tr. p. 21-22. Liability may also be imposed on an employee and "Gale" testified that she acted as a "general manager" supervising the daily operations of the company. Tr. p. 65-66.

The evidence indicates that "Gale" had significant control over the business affairs of "GPOVC", and that she participated in decisions regarding the payment of creditors and disbursement of funds. "Gulch" testified that "Gale" or someone in the office would prepare a list of payables and that "Gale" would bring the list to "Gulch" to discuss. "Gulch" testified that "Gale" notified her that she was behind in the payment of taxes but she gave precedence to the payroll. Tr. p. 23-27. "Gale" testified that she made sure that "the general administration of the company was kept up, that bank deposits were made, that bills were paid, that payroll went out, things like that." Tr. p. 66.

"Gale" testified that she could not write a check unless "Gulch" approved it and that she would have written a check to the Department of Revenue if he could have done so. Tr. p. 72-73. "Gulch" testified that although "Gale" advised her that she was behind in her taxes, she gave precedence to the payroll. Tr. p. 23-27. "Gulch's" acceptance of responsibility for the non-payment of taxes must be balanced against the fact that no NPL has been issued against her. I find "Gale's" testimony that she could not write a check without "Gulch's" approval to not be credible. "Anne T. Em" testified that she would write the checks and "then take it into "Dorothy" ("Gale") or "Elvira" ("Gulch") and then they'd sign it." Tr. p. 12. Counsel for "Gale" asked Ms. "Em" the following question: "And then you would actually write the check and give it to "Dorothy" or "Elvira" for signature?" "Em" responded "Right." Tr. p. 13.

In order to overcome the Department's *prima facie* case, evidence must be presented which is consistent, probable and identified with the corporation's books and records. Central Furniture Mart, Inc. v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987). "Gale" did not present any evidence of

bank signatory cards, check approval authorizations or copies of cancelled checks. I must conclude, based on the testimony presented, that "Gale" had the power to sign checks, and accordingly, could have written a check for taxes. The fact that "Gale" chose not to write checks or acquiesced in "Gulch" writing the checks does not relieve her of personal responsibility under the Act. The evidence shows that "Gale" had the power and responsibility to direct that taxes be paid and accordingly, she is a responsible party pursuant to the statute.

The second element which must be met in order to impose personal liability is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into evidence. Branson v. Dept of Revenue, 168 Ill.2d 247 (1995). The burden, then, is on the responsible party to rebut the presumption of willfulness.

"Gulch" attempted to rebut the presumption of willfulness by testifying that the two payments of \$8,650 made on the installment contract with the Department show that the corporation intended to meet its obligations. "Gulch" testified that in August of 1993, "Marvel", without "Gulch's" knowledge, advised the Department that they were going into bankruptcy. Tr. p. 38. The Department then levied the corporate bank accounts, without "Gulch's" knowledge, and the payroll bounced. Tr. p. 37. "Gulch" testified that the Department just "pulled the plug" when she "hadn't done anything to renege on the contract or breach the contract." Tr. p. 40. I find "Gulch's" arguments here to be unpersuasive. It was "Gulch's" decision to keep the business open, and it appears that in order to do so, she made the installment payments for the prior period's taxes. These taxes were a legitimate debt of the corporation and the fact that she paid some installments does not absolve "Gale" of responsibility for those taxes which were not paid.

On the "NUC-1," "Gale" accepted personal responsibility for the filing of returns and payment of taxes. Tr. p. 74; Dept Gr. Ex. No. 2. "Gulch" testified that "Gale" notified her that she



was behind in the payment of sales taxes, but that "Gulch" paid the payroll first. Tr. p. 23-27. "Em" testified that after "Gale" and "Gulch" determined which bills to pay, "Em" would write the check and take it to "Gale" or "Gulch" and they would sign it. Tr. p. 12-13. "Gale" obviously had the power to sign checks but acquiesced in "Gulch" writing the checks and determining the priority of payment. Under Illinois law, if a responsible officer uses collected retailers' occupations taxes to pay other creditors of the corporation, while knowing that he is obligated to file the returns and remit the taxes, the willful element of Section 13 ½ is satisfied. Branson v. Department of Revenue, 168 Ill.2d 247, 259 (1995). The testimony shows that "Gale" was in a position to direct that the taxes be paid, but allowed "Gulch" to pay the payroll first. I have concluded that the evidence presented does not rebut the Department's presumption that "Gale" willfully failed to pay the corporation's taxes.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability be finalized as issued.

Date: July 6, 1999

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Kenneth J. Galvin  
Administrative Law Judge